



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

June 10, 2003

Mr. Randall L. Meredith
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Corpus Christi Independent School District
P. O. Box 110
Corpus Christi, Texas 78403-0110

OR2003-3974

Dear Mr. Meredith:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 182517.

The Corpus Christi Independent School District (the "district") received a request for five categories of information pertaining to a specified teacher. You indicate that you have provided the requestor with some responsive information. You claim, however, that the remaining requested information is excepted from disclosure pursuant to sections 552.101 and 552.102 of the Government Code, as well as rule 503 of the Texas Rules of Evidence.¹ We have considered the exceptions you claim and have reviewed the submitted information.

Initially, we note that the district did not submit any responsive information to us for review other than information that is responsive to request items 1 and 2 of the request. We, therefore, presume that the district has already provided the requestor with any other information that would be responsive to the request to the extent that it exists. If not, the district must do so at this time. *See* Gov't Code §§ 552.006, .301, .302; *see also* Open

¹ We note that in Open Records Decision No. 676 (2002), this office determined that the statutory predecessor to section 552.107(1) was the appropriate exception to disclosure for a governmental body to cite when seeking to protect communications made between the governmental body and its legal counsel. Accordingly, we will address your claim regarding rule 503 of the Texas Rules of Evidence under section 552.107 of the Government Code. *See, e.g.*, Open Records Decision No. 676 at 6 (2002) (appropriate law for a claim of attorney-client privilege for information not subject to section 552.022 is section 552.107(1)).

Records Decision No. 664 (2000) (noting that if governmental body concludes that no exceptions apply to requested information, it must release information as soon as possible under circumstances).

You claim that portions of the submitted information are excepted from disclosure pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.² Section 21.355 provides that "[a] document evaluating the performance of a teacher or administrator is confidential." Educ. Code § 21.355. This office has interpreted this section to apply to any document that evaluates, as that term is commonly understood, the performance of a teacher or administrator. *See* Open Records Decision No. 643 (1996). In that opinion, this office also concluded that a teacher is someone who is required to hold and does hold a certificate or permit required under chapter 21 of the Education Code and is teaching at the time of his or her evaluation. *See id.* Similarly, an administrator is someone who is required to hold and does hold a certificate required under chapter 21 of the Education Code and is administering at the time of his or her evaluation. *See id.* We note that section 21.352(c) specifically provides that "[e]ach teacher is entitled to receive a written copy of the evaluation on its completion." It is well established that statutes governing access to a specific subset of information held by a governmental body prevail over the generally applicable provisions of the Public Information Act (the "Act"). *See, e.g.,* Open Records Decision No. 478 at 2-3 (1987) (Act does not govern special rights of access granted under other statutes).

Assuming that the individual who is the subject of the submitted information held a certificate or permit required under chapter 21 and was teaching at the time of her evaluation, we find that two of the submitted documents, which we have marked, constitute evaluations of this teacher as that term is commonly understood. You state that the district has not received an authorization for release of information that has been signed by the teacher who is the subject of this request. Accordingly, we conclude that the documents that we have marked are excepted from disclosure pursuant to section 552.101 in conjunction with section 21.355 of the Education Code. However, because no portion of the remaining submitted information constitutes such an evaluation, we also conclude that the district may not withhold any portion of the remaining submitted information pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code.

We note that this teacher's social security number may be excepted from disclosure pursuant to section 552.117(1) of the Government Code. Section 552.117(1) excepts from disclosure the home addresses and telephone numbers, social security numbers, and family member information of current or former officials or employees of a governmental body who timely request that this information be kept confidential under section 552.024 of the Government

² Section 552.101 of the Government Code excepts from disclosure information considered to be confidential by law, either constitutional, statutory, or by judicial decision. *See* Gov't Code § 552.101. Section 552.101 encompasses information that is protected from disclosure by other statutes.

Code. *See* Gov't Code § 552.117(1). However, information that is responsive to a request may not be withheld from disclosure under section 552.117(1) if the employee did not request confidentiality for this information in accordance with section 552.024 or if the request for confidentiality under section 552.024 for the information was not made until after the request for information at issue was received by the governmental body. Whether a particular piece of information is public must be determined at the time the request for it is made. *See* Open Records Decision No. 530 at 5 (1989). Accordingly, we conclude that the district must withhold this teacher's social security number pursuant to section 552.117(1) of the Government Code, but only if the teacher timely elected confidentiality for the number in accordance with section 552.024 of the Government Code prior to the time that the district received this request.

Nevertheless, the teacher's social security number may be confidential under section 552.101 in conjunction with federal law. The 1990 amendments to the federal Social Security Act, 42 U.S.C. § 405(c)(2)(C)(viii)(I), make confidential social security numbers and related records that are obtained or maintained by a state agency or political subdivision of the state pursuant to any provision of law enacted on or after October 1, 1990. *See* Open Records Decision No. 622 (1994). The district has cited no law, nor are we aware of any law, enacted on or after October 1, 1990, that authorizes it to obtain or maintain social security numbers. Therefore, we have no basis for concluding that this number is confidential under section 405(c)(2)(C)(viii)(I) of title 42 of the United States Code. We caution the district, however, that section 552.352 of the Government Code imposes criminal penalties for the release of confidential information. Prior to releasing this social security number, the district should ensure that it was not obtained and is not maintained by the district pursuant to any provision of law enacted on or after October 1, 1990.

You also claim that portions of the submitted information are excepted from disclosure pursuant to section 552.102(b) of the Government Code. Section 552.102(b) states:

a transcript from an institution of higher education maintained in the personnel file of a professional public school employee, except that this section does not exempt from disclosure the degree obtained or the curriculum on a transcript in the personnel file of the employee.

Gov't Code § 552.102(b). Based on our review of your representations and the submitted information, we conclude that the district must withhold the submitted college transcripts of the teacher pursuant to section 552.102(b) of the Government Code, except for the information on these transcripts pertaining to the curriculum and degree obtained.

Finally, you claim that the information that is responsive to the first request is subject to the attorney-client privilege and should not be released to the requestor. Section 552.107(1) of the Government Code protects information coming within the attorney-client privilege. When asserting the attorney-client privilege, a governmental body maintains the burden of

providing the necessary facts to demonstrate the elements of the privilege in order to withhold the information at issue. *See* Open Records Decision No. 676 at 6-7 (2002). First, a governmental body must demonstrate that the information constitutes or documents a communication. *See id.* at 7. Second, the communication must have been made "for the purpose of facilitating the rendition of professional legal services" to the client governmental body. *See* TEX. R. EVID. 503(b)(1). The privilege does not apply when an attorney or representative is involved in some capacity other than that of providing or facilitating professional legal services to the client governmental body. *See In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340 (Tex. App.—Texarkana 1999, orig. proceeding) (attorney-client privilege does not apply if attorney acting in a capacity other than that of attorney). Governmental attorneys often act in capacities other than that of professional legal counsel, such as administrators, investigators, or managers. Thus, the mere fact that a communication involves an attorney for the government does not demonstrate this element.

Third, the privilege applies only to communications between or among clients, client representatives, lawyers, and lawyer representatives. *See* TEX. R. EVID. 503(b)(1)(A), (B), (C), (D), (E). Thus, a governmental body must inform this office of the identities and capacities of the individuals to whom each communication at issue has been made. Lastly, the attorney-client privilege applies only to a confidential communication, *see id.* 503(b)(1), meaning it was "not intended to be disclosed to third persons other than those to whom disclosure is made in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." *See id.* 503(a)(5). Whether a communication meets this definition depends on the intent of the parties involved at the time the information was communicated. *See Osborne v. Johnson*, 954 S.W.2d 180, 184 (Tex. App.—Waco 1997, no writ). Moreover, because the client may elect to waive the privilege at any time, a governmental body must explain that the confidentiality of a communication has been maintained. Section 552.107(1) generally excepts an entire communication that is demonstrated to be protected by the attorney-client privilege unless otherwise waived by the governmental body. *See Huie v. DeShazo*, 922 S.W.2d 920, 923 (Tex. 1996) (privilege extends to entire communication, including facts contained therein).

Based on our review of your representations and the document at issue, we agree that this document reflects confidential communications exchanged between privileged parties that were provided in furtherance of the rendition of legal services to the client. Accordingly, we conclude that the district may withhold this document in its entirety pursuant to section 552.107(1) of the Government Code.

In summary, the district must withhold the information that we have marked pursuant to section 552.101 of the Government Code in conjunction with section 21.355 of the Education Code. The district must withhold the social security number of the teacher who is the subject of this request pursuant to section 552.117(1) of the Government Code, but only if the teacher timely elected confidentiality for the number in accordance with section 552.024 of the Government Code prior to the time that the district received this

request. Nevertheless, the teacher's social security number may be confidential under federal law. The district must withhold the submitted college transcripts of the teacher pursuant to section 552.102(b) of the Government Code, except for the information on these transcripts pertaining to the curriculum and degree obtained. The district may withhold the document that it seeks to withhold under the attorney-client privilege in its entirety pursuant to section 552.107(1) of the Government Code. The district must release the remaining submitted information to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

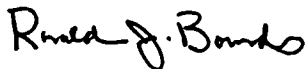
If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or

complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



Ronald J. Bounds
Assistant Attorney General
Open Records Division

RJB/lmt

Ref: ID# 182517

Enc. Marked documents

c: Ms. Susie Luna-Saldana
Staff Representative
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(w/o enclosures)